BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ENDERCIO PEREZ	)	
Claimant	)	
	)	
V.	)	
	)	
JOSE HERNANDEZ, d/b/a	)	**CS-00-0066-285**
JOE AND SONS TRUCKING	)	**AP-00-0457-359**
Uninsured Respondent	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The claimant, through Randy Stalcup, requested review of Administrative Law Judge (ALJ) Pamela Fuller's Post Award Medical Decision dated March 25, 2021. Gerald Schultz appeared for the respondent. Travis Ternes appeared for the Kansas Workers Compensation Fund (the Fund). The case has been placed on the summary docket for disposition without oral argument.

RECORD AND STIPULATIONS

The Board considered the post award record and adopted the stipulations listed in the Award, as well as the parties' briefs. The record consists of the deposition of Daniel D. Zimmerman, M.D., dated January 18, 2021; the deposition of Michael Johnson, M.D., dated January 19, 2021; the transcript of the Post Award Hearing held on January 20, 2021; as well as the evidence admitted in the original litigation, including the deposition of Endercio Perez, Jr., dated April 12, 2018; the deposition of Paul Hardin, dated December 27, 2019; the deposition of Steve Benjamin, dated January 15, 2020; the deposition of Daniel D. Zimmerman, M.D., dated January 20, 2020; the deposition of Matthew Henry, M.D., dated February 11, 2020; the deposition of Pat Do, M.D., dated March 4, 2020; the Regular Hearing transcript, dated April 10, 2020; the deposition of Paul Hernandez, dated May 27, 2020; the deposition of Guadalupe Hernandez dated May 27, 2020; the exhibits admitted into evidence by each party; and the pleadings and correspondence contained in the administrative file.

ISSUES

1. Is the claimant entitled to post award medical treatment?

2. Should the claimant's future medical benefits be terminated?

FINDINGS OF FACT

The claimant worked for the respondent as a truck driver. On February 14, 2018, he felt a sharp pain in his back while shoveling corn. February 14, 2018, was the last day he worked for the respondent.

The claimant initially went to the emergency room at a hospital in Ulysses on the date of accident. The claimant reported low back pain. Right leg complaints were not noted. The claimant later testified he was not having leg pain at the ER.

A physician referred the claimant for treatment with Matthew Henry, M.D., a board-certified neurosurgeon. On April 25, 2018, Dr. Henry issued temporary light duty restrictions of no lifting over 10 pounds and limited walking. Dr. Henry ordered physical therapy, which did not benefit the claimant. In an order dated May 4, 2018, the ALJ ordered Dr. Henry to examine the claimant, to provide treatment recommendations, and provide medical treatment, in the event Dr. Henry opined the prevailing factor for the claimant's need for treatment was the work accident.

In May or June 2018, the claimant obtained employment with a different trucking company, Cruz Ochoa. This employment lasted about a month. The claimant's employment ended after he temporarily aggravated his back in the "same area" he previously injured.[1] The claimant testified this job was supposed to involve an automatic hopper, but it did not, and operating the manual hopper caused him pain. The claimant testified once he stopped working, his temporarily-increased symptoms resolved.

On June 6, 2018, Dr. Henry sent a letter to the ALJ stating the claimant had a right sacroiliac joint injury, the prevailing factor of which was the work injury. Dr. Henry ordered a right sacroiliac joint injection, which slightly helped the claimant. By June 26, 2018, Dr. Henry indicated the claimant was at maximum medical improvement (MMI) from a surgical standpoint. Dr. Henry noted the claimant reported low back pain, but he had no numbness, tingling or leg pain. After filling the claimant's medication, the doctor released the claimant from treatment, to follow-up as needed. Dr. Henry did not provide permanent work restrictions, partially because of his belief such restrictions make it difficult for patients to find employment.

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[1] P.A.M. Trans. at 9.

At the claimant's attorney's request, Daniel Zimmerman, M.D., who was certified as an independent medical examiner through 2014, initially saw the claimant on July 16, 2018, for an independent medical examination (IME). The claimant's chief complaint was a back injury. The claimant had low back pain into his right buttock and right thigh. He had a right-sided limp. The claimant reported numbness and tingling in the right posterior thigh which, when particularly severe, radiated to his knee. The claimant indicated he had such right upper thigh discomfort at least twice since the February 14, 2018 injury. Physical examination revealed low back pain. The claimant reported a burning sensation when Dr. Zimmerman palpated his right sciatic notch. The claimant had a positive right straight leg raise test. Dr. Zimmerman indicated the claimant's work accident resulted in an injury to the claimant's lumbar spine and the development of right lower extremity radicular pain. Dr. Zimmerman opined the claimant would need future medical treatment to be supervised by a physician, including non-steroidal anti-inflammatory drugs, the possibility of steroid injections, trigger point injections, facet injections, and treatment with a pain management physician.

In August 2018, the claimant started hauling grain for a farmer, Mike Schmitt. This job was a "no touch" trucking job. At the regular hearing, the claimant testified he only developed right leg pain months after getting hurt and probably during the time he was working for Mr. Schmitt.

Pat Do, M.D., a board-certified orthopedic physician, evaluated the claimant at the court's request on January 16, 2019. The claimant's primary complaint was right posterior buttock pain. On physical examination, Dr. Do recorded the claimant had a "very clear-cut positive" straight leg raise test for the right leg and radicular symptoms.[2] Dr. Do's impression was an L5-S1 protruding disc. Dr. Do opined the prevailing factor for the claimant's lumbar pain and right leg radiculopathy was the work accident. The doctor noted the claimant might need epidurals or even a lumbar laminectomy. Eventually, in May 2019, Dr. Do referred the claimant to another doctor, who provided the claimant with two lumbar epidural steroid injections without benefit.

On July 9, 2019, Dr. Do stated he and the claimant previously discussed more injections or lumbar spine surgery, but the claimant declined these potential treatment options. Therefore, Dr. Do released the claimant from active medical care that day. Dr. Do's diagnoses were low back pain, an L5-S1 protrusion and lumbar radiculopathy. Dr. Do provided the claimant with medium-level work restrictions. The claimant received no further treatment.

Dr. Do issued the claimant an impairment rating of 12% to the body as a whole under the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed.

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[2] Do Depo., Ex. 4 at 2.

The claimant continued working in a no-touch trucking position for Mr. Schmitt from January through March 2020, stopping due to COVID, and then resumed work from October through December 2020. He testified he was able to work using over-the-counter pain medications. The claimant also testified he obtained prescription pain medication from a family physician.

At the regular hearing on April 10, 2020, the claimant testified he had low back pain, as well as pain going down his right leg about once a week.

The ALJ issued an Award on July 20, 2020. The respondent stipulated the accident was the prevailing factor causing the claimant's injury, medical condition, need for treatment and resulting disability or impairment. The ALJ found the opinions of Dr. Do to be the most credible because he was an independent examiner and the most recent doctor to examine the claimant. As such, the court adopted Dr. Do's impairment rating for low back pain with right leg radiculopathy. Finally, the ALJ awarded the claimant the right to seek future medical treatment.

At his attorney's request, Dr. Zimmerman reevaluated the claimant on September 17, 2020. The claimant complained of pain and discomfort affecting his lumbar spine and radiating pain into his right lower extremity. The claimant had a right-sided limp. On physical examination, the claimant had range of motion restrictions at the lumbar spine, as well as pain and discomfort with palpation of the lumbar spine and lumbar paraspinous musculature. He had a positive straight leg test on the right and sensory change in the toes of the right lower extremity. Dr. Zimmerman recommended additional treatment, including prescription medication, diagnostic testing, trigger point injections, lumbar epidural steroid injections, facet blocks, and radiofrequency ablation procedures conducted by a pain management physician. Dr. Zimmerman opined the prevailing factor for the claimant's need for treatment was the February 14, 2018 work accident.

When asked what the biggest change was between his 2018 and 2020 examinations, Dr. Zimmerman testified, "I think his examination findings were more significant in 2020 than they had been when he was seen in 2018."[3] Dr. Zimmerman opined the increased complaints implied a structural change, but an MRI would assist in determining if a structural change occurred. The doctor was unaware Dr. Do had treated the claimant after his 2018 report. Dr. Zimmerman did not have Dr. Do's treatment records and agreed such records might affect his opinion. Further, the doctor did not know about the claimant's brief work for Cruz Ochoa or the claimant's testimony his leg pain did not start or become consistent until months after his February 14, 2018 accident.

[3] Zimmerman Depo. at 10.

The claimant also saw Michael Johnson, M.D., an orthopedic surgeon, for an IME at the Fund's request on September 17, 2020. The claimant presented with chief complaints of low back pain and right leg pain. On physical examination, the only abnormal finding was a decrease in lumbar range of motion. The claimant did not have a positive straight leg raise test. Dr. Johnson assessed the claimant as having: (1) L5-S1 degenerative disc disease, which caused bulging or a protrusion, as well as facet joint arthritis; (2) occasional right lower extremity numbness on two occasions after the February 14, 2018 accident; and (3) consistent right lower extremity radiculopathy beginning in 2019, secondary to new employment.

Dr. Johnson opined the claimant's conditions were preexisting, degenerative, age-related, and genetic. The doctor stated the claimant had a symptomatic aggravation of this condition, including leg numbness, due to the injury on February 14, 2018. Dr. Johnson indicated the claimant had more consistent radiculopathy from 2019 to the present, which was due to degenerative disc disease, not a traumatic injury, and represented a symptomatic aggravation. The doctor indicated the anatomic findings on imaging studies were not caused by any employment. According to Dr. Johnson, the claimant's symptomatic aggravation from 2019 forward was due to the claimant's subsequent employment. Dr. Johnson's report states, "The new employer of 2019 appears to be causing more aggravation to his lumbar spine [than] what had occurred in the post 2/14/18 time period."[4] The following testimony was also provided by Dr. Johnson:

> Q. And did that radiculopathy become consistent after [the claimant] went to his employment with Ochoa?
>
> A. In looking at the records in general, it doesn't look like he was having more consistent and specifically more objective verifiable radiculopathy in 2019 to the present date than what he did in 2018.
>
> . . .
>
> Q. Doctor, is it a fair statement that in your opinion the aggravation that you observed under your examination in September of 2020, was more likely caused by the new employer than his 2018 injury with my employer?
>
> A. Correct.
>
> . . .

[4] Johnson Depo., Ex. 2 at 6.

> A. So when I looked at the records it appeared that, yes, he did have some symptom aggravation in 2-14-18 to his back. And it looks like some to his leg, but it wasn't very consistent.
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> In fact, Dr. Zimmerman in his report said that it was a couple times. But then when you start looking at the records beyond 2019, when he was working for his second employer, up to the time that I saw him, the symptoms were -- or appear to be reportedly worse. Started to have a few maybe more objectifiable symptoms or opinions, more verifiable objective findings.
>
> And so just looking at this kind of from a looking down on it, kind of looking at it from the sky, it appears that his new job in [2019] was causing some symptom aggravation than his original injury in 2018.[5]

Dr. Johnson placed the claimant at MMI and testified the claimant could pursue a home exercise program and over-the-counter pain relievers. Dr. Johnson stated the claimant could use medication, but only to palliate his pain, not as a cure. The doctor noted physical therapy and injections did not help the claimant. The doctor stated no additional medical treatment was recommended for the aggravation of February 14, 2018. Dr. Johnson indicated the claimant did not need lumbar spine surgery. The doctor opined the prevailing factor for the claimant's symptoms was his post-2018 employment.

Dr. Johnson did not have an in-depth discussion with the claimant about his employment subsequent to working for the respondent. The doctor knew the claimant's general job titles and understood the claimant performed manual labor and physical work.

On August 6, 2020, the claimant filed an application for post award medical treatment. On January 7, 2021, the Fund filed a motion to terminate the claimant's medical treatment.

At the post award hearing, the claimant testified he had daily back pain, with pain and numbness radiating down his right leg, from his buttock to his ankle, about every other day. He testified his symptoms were worse than immediately following the 2018 work injury, but are in the same area. The claimant initially testified in the post award hearing his right leg symptoms just kept worsening after his injury on February 14, 2018. However, the claimant was reminded he testified at the regular hearing his right leg pain did not start until after he left his employment with the respondent and started working elsewhere.

On March 25, 2021, the ALJ issued the Post Award Medical Decision, stating:

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[5] *Id*. at 11-12, 15, 17.

1. The claimant's request for authorized medical treatment is denied. The respondent's/fund's request for termination of future medical benefits is denied.

K.S.A. 44-510K(a)(2) requires a finding that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury. I[t] also allows for termination of current or future medical care if it is found that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or the care requested is not necessary to cure or relieve the effects of such injury.

The claimant testified that his condition is getting worse. That the employment he had after he last worked for the respondent, caused him more pain. He was let go after he agitated his back while working for them. He then began other employment. The claimant said he is willing to proceed with surgery if it is recommended. He did not make specific treatment requests, merely requested authorized medical treatment.

Dr. Zimmerman made a number of possible treatment options, some of which the claimant had previously been afforded and testified were not beneficial. Dr. Zimmerman was not provided Dr. Do's records of treatment that occurred between his examinations. Dr. Zimmerman said his treatment opinion was subject to possible change depending on those records.

Dr. Johnson found the claimant to be at maximum medical improvement. He found that the claimant's current aggravation was likely due to his employment subsequent to working for the respondent. He stated the prevailing factor for the claimant's aggravation was his new employment and that aggravation was of a preexisting condition. Dr. Johnson said the claimant could do home exercises and take over the counter medication to help with the symptoms. He would not recommend surgery.

The claimant has failed to prove that he is in need of any medical treatment at this time. It is found, that the claimant had an aggravation of his injury while working for a new employer, but it is not clear whether that was a temporary or permanent aggravation. Therefore, based on the evidence presented, the claimant's request for authorized medical treatment is denied. The respondent's/fund's request for termination of future medical benefits is denied.

The claimant argues he is entitled to post award medical treatment and contends his medical expert's opinion regarding prevailing factor is more credible. Both the respondent and the Fund argue the claimant is not entitled to post award medical treatment and his right to future medical treatment should be terminated. The respondent and the Fund assert the claimant suffered a subsequent intervening event and the prevailing factor for his current complaints is not the underlying work accident.

PRINCIPLES OF LAW AND CONCLUSIONS

An employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment.[6] The burden of proof is on the claimant.[7] The respondent must prove any affirmative defense.[8]

K.S.A. 44-508(g) states, "'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties."

K.S.A. 44-510k states, in part:

> (a)(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the . . . employer or insurance carrier may make application for a hearing . . . for the . . . termination . . . of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge . . . and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.
>
> (2) The administrative law judge can . . . (B) terminate . . . an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury . . . is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.
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> (3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.
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> (4) No post-award benefits shall be . . . terminated without giving all parties to the award the opportunity to present evidence . . . . A finding with regard to a disputed issue shall be subject to a full review by the board under . . . [K.S.A. 44-551(b)] . . . . Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

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[6] K.S.A. 44-501b(b).

[7] See K.S.A. 44-501b(c).

[8] *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

K.S.A. 44-516 states the report of any court-ordered neutral health care provider shall be considered by the judge in making a final determination. The Board must consider a court-ordered IME report.[9]

Board review of an order is de novo on the record.[10] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[11] On de novo review, the Board makes its own factual findings.[12]

1. The claimant is entitled to post award medical treatment.

Both testifying doctors in the post award proceeding have imperfect understandings of the case. However, the Board affords more weight to Dr. Zimmerman's opinions.

Dr. Zimmerman did not have treatment records from Dr. Do. Some of the treatment modalities recommended and carried out by Dr. Do were also recommended by Dr. Zimmerman. Dr. Johnson indicated such medical treatment was of no benefit. Dr. Zimmerman did not know about the claimant's brief work for Cruz Ochoa or the claimant's testimony his leg pain did not start or become consistent until months after his February 14, 2018 accident.

Dr. Johnson indicated the claimant's February 14, 2018 work accident and the claimant's subsequent employment did not cause any anatomical findings, i.e., no structural changes, and the claimant only had aggravations of an asymptomatic preexisting condition when working for the respondent and subsequent employers. The doctor's opinion ignores the legal conclusion, contained in the ALJ's original Award, establishing the claimant sustained a compensable, permanent and impairing low back injury, in addition to right lower extremity radiculopathy, due to the February 14, 2018 accidental work injury, as noted in the adopted report from a court-ordered physician, Dr. Do. The compensability of this claim, including the prior finding of a permanent and impairing injury, and the nature and extent of the initial injury, will not be relitigated in this proceeding.[13]

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[9] See *Alaniz v. Dillon Cos., Inc.*, No. 109,784, 2014 WL 3731939, at *9 (Kansas Court of Appeals unpublished opinion filed July 25, 2014).

[10] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[11] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[12] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[13] See *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009), *rev. denied* 290 Kan. 1095 (2010).

Dr. Johnson stated Dr. Zimmerman's initial report showed the claimant had severe right leg symptoms on only a couple occasions. However, a fair reading of Dr. Zimmerman's report could mean the claimant had less-than-severe right leg symptoms on occasions apart from the two severe instances. It does not follow the claimant only had right leg symptoms twice; he simply only had severe right leg symptoms twice.

The claimant is not taking prescribed medication for his injury. Dr. Zimmerman recommended prescription medication. Dr. Zimmerman also recommended diagnostic testing, trigger point injections and pain management interventions, such as lumbar epidural steroid injections, facet blocks and radiofrequency ablation procedures conducted by a pain management physician. While it is true lumbar epidural steroid injections have not benefitted the claimant in the past, facet blocks and radiofrequency ablation under the direction of a pain management physician have not been attempted. Even if prior modalities did not work, the claimant nevertheless needs medical treatment.

Basically, Dr. Zimmerman recommended medical treatment and opined the prevailing factor for the treatment is the injury of February 14, 2018. Looking at Dr. Johnson's opinions through a legal lens, the doctor does not view the claimant's accidental injury as compensable because the claimant has only had aggravations of preexisting conditions and no structural changes. Contrary to Dr. Johnson's opinions, the claimant sustained a permanent and compensable injury. Dr. Zimmerman's opinions are more credible. The claimant requires, and is entitled to, additional post award medical treatment. Accordingly, this matter is remanded to the ALJ for an order for post award medical treatment consistent with this opinion.

Because the claimant proved his work injury was the prevailing factor in the need for additional medical treatment, the ALJ's conclusion future medical should be denied because of an aggravation while working for a new employer is reversed.

2. Given the award of additional medical treatment, the Fund's motion to terminate the claimant's medical treatment is moot.

The Board's decision to award the claimant additional medical treatment obviates the need to address the Fund's motion to terminate medical treatment. The issue is moot.

CONCLUSIONS

1. The claimant is entitled to post award medical treatment. This matter is remanded to the ALJ to issue an order providing for additional medical treatment consistent with this opinion.

2. The Fund's motion to terminate medical treatment is denied.

AWARD

WHEREFORE, the Board, in part, reverses and affirms the Post Award Medical Decision dated March 25, 2021, as noted above[14]

IT IS SO ORDERED.

Dated this _____ day of June, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

Electronic copies via OSCAR to:
Randy Stalcup
Gerald Schultz
Travis Ternes
Hon. Pamela Fuller

[14] As required by the Workers Compensation Act, the entire Board considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.